IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL 635 OF 2002

Ramesh Bhagwan Shinde & ors ... Appellants

vs

The State of Maharashtra .. Respondent

WITH CRIMINAL APPEAL NO. 790 of 2002

Mahesh Bhagwan Shinde .. Appellant

vs

State of Maharashtra .. Respondent

Mr.V.M.Thorat with Mr.S.S.Salunkhe for Appellants

Ms.P.H.Kantharia, APP for Respondent

CORAM: D.G.DESHPANDE AND SMT.ROSHAN DALVI, JJ

DATE : 16th November, 2006

JUDGMENT (Per D.G.Deshpande, J)

1. Appeal No.635 of 2002 is filed by original accused nos. 1 to 4 and another appeal is filed by accused no.5.

2. We have heard Mr.Thorat for the accused. In both the appeals, Ms.Kantharia APP for the respondent.

3. The accused came to be convicted by the Sessions Judge, Solapur by a judgment dated 20th May, 2002. Accused nos. 2 and 3 were convicted under section 147 of the IPC and sentenced to suffer R.I. for 1 year. Accused nos. 1,4 and 5 were convicted under section 148 of IPC and to suffer R.I. for 2 years. Accused nos. 1 to 5 were convicted under section 307 read with section 149 of IPC and sentenced to suffer R.I. for 5 years and pay a fine of Rs.2000/- in default of sentence. All the accused were convicted under section 302 read with section 149 of IPC and sentenced to imprisonment for life and with fine etc. They were also convicted under section 135 (1) of the Bombay Police Act and sentenced to

suffer R.I. for 6 months and fine. All the substantive sentences were directed to run concurrently.

4. Accused no. 2 is the father of accused nos. 1,3,4 and 5. Name of the deceased was Dattatraya Gavane who was the elder brother of PW 17 Kumar Gavane. The deceased Dattatraya was the owner of a kirana shop and was also doing transport business with the help of his jeep. Accused nos. 1 and 5 were also doing some business and other accused were helping him. Three months before the incident which took place on 31st December, 2000 there was a petty quarrel between the deceased Dattatraya and the accused. An attempt to settle was done. But, the accused were still enraged with Dattatraya. On 31st December, 2000 at about 5 p.m. the accused came in front of the house of Dattatraya when he was not there. They abused PW 10 Asha Gavane the wife of Dattatraya and left the place. But they were searching for Dattatraya. On the same day, at about 6.30 p.m. Kumar Gavane PW 17 was standing near a pan stall of Jamir Shaikh alongwith Dattatraya near the railway gate. PW 16 Ganesh Kale the brother-in-law of Dattatraya was also there. At that time, all the accused came, armed

with weapons. They surrounded Dattatraya and accused no. 1 stabbed Dattatraya in his stomach. He fell on the ground. Then PW 16 Ganesh Kale tried to catch the accused. But, the knife held by accused no. 5 Mahesh struck on the shirt of Ganesh Kale and then the accused ran away.

5. PW 17 Kumar Gavane and PW 16 Ganesh Kale took Dattatraya to Wagalehospital by an autorickshaw. The doctor examined and declared him dead. Then PW 15 Suresh Salve lodged a report of the incident at P.S.Kurduwadi. An offence came to be registered by PSI Santosh Gaikwad PW 18.

6. After sometime, PW 17 Kumar Gavane again came to the police station and informed the police that he had wrongly named the accused no.1 as the person stabbing with a dagger in the stomach of Dattatraya. But, the actual assailant was accused no.5. PW 17 Kumar Gavane explained to the police that he was perplexed due to the attack of murder on his brother.

7. Thereafter, the investigation started. The inquest panchanama on the dead body was made. The post mortem was conducted. The clothes of the

deceased were recovered. The next day the spot panchanama of the place was prepared in presence of panchas alongwith a rough sketch map Exhibits 23 and 24 respectively. The clothes of the deceased were recovered in the presence of panchas and accused nos. 2 and 3 were arrested. Their clothes were seized under a panchanama. On the next day i.e. 2nd January, 2001 the accused no. 4 was arrested. His clothes were recovered. The jeep was seized in presence of panchas. On the same day i.e. 2nd January, 2001 the accused no.1 was arrested. His clothes stained with blood were seized in presence of the panchas.

8. Thereafter, the weapons were recovered at the instance of the accused nos. 1 and 4. The blood samples of the accused were taken. All the muddemal properties were sent to the C.A. and then the charge sheet was filed.

9. During trial, the prosecution examined as many as 18 witnesses. The trial Court believed the version of the prosecution and convicted the accused as stated above.

Hence, these appeals.

10. There is no serious doubt that Dattatraya died a homicidal death. But according to Mr.Thorat, learned counsel for the appellants, the trial Court committed a grievous error in convicting all the accused when in any event, the evidence pointed to the accused no. 5 only. This was of course not in the admission of accused no.5. But, it was his alternative argument. According to him, there was no evidence against accused nos. 1 to 4 in any case and they were entitled for an acquittal.

11. Out of the 18 witnesses examined, first 8 witnesses are the panch witnesses. Witness no. 9 is the carrier of property to the C.A. Witness no.10 is Asha Gavane wife of Dattatraya. However, she has not seen the incident at all i.e. the incident of actual assault upon her husband. She has stated that on the date of the incident at about 5 p.m. all the five accused came to her house in a jeep and abused her husband and went away giving threats that he would be killed. The witness however, stated that thereafter she along with her nephew Satish Gavane went to the naka at the railway gate. All the accused were there. She told them that she had come. She is alone and they

can do whatever they want to her. Then accused Mahesh caught hold the neck of Satish but, she rescued Satish and all of them went towards Barshi Road. According to her, she and Satish went to the police station where some persons informed her that her husband known as Nana was assaulted. In the meantime, her husband was brought to the police station in a rickshaw. He was taken to the hospital where she learnt that he was dead.

12. The next witness is PW 11 Dr.Vikas Patil who has conducted the post mortem. He noted single stab injury piercing the abdomen oblique and directed towards the left side of the chest and it pierced the heart ventricle. It was an ante-mortem injury and the cause of death was injury to vital organs. There is no serious dispute about this aspect of the matter.

13. Then next witness is PW 12 the daughter of Dattatraya by name Anuradha Gavane aged 8 years on the date of her deposition which came to be recorded on 7th February, 2002. The incident has occured on 31st December, 2000. Therefore, obviously she was 6 years of age at that time. She has stated that on that day at about 6.15 p.m. She

went with her father to the pan shop near the naka. Her uncle Kumar Gavane was present and Ganesh Mama was also talking there with her father. At that time. according to her, all the accused came in a jeep near them, got down, came near Nana i.e. Dattatraya and then Mahesh took out a dagger and stabbed in the stomach of Nana. Her uncle came running from the pan stall and her uncle and Ganesh Mama lifted Dattatraya and took him to hospital. She also stated that Ganesh chased accused Ramesh in order to catch him but, Ramesh had a dagger and he stabbed Ganesh Mama with it but, it resulted in tiering the shirt of Ganesh. Her frock was stained with the blood of her father.

14. Next witness is Nazir Bagwan PW 13. He knows all the accused and the deceased Dattatraya, Kumar Gavane and Ganesh Kale. According to him, it was on 31st December, 2000 at about 6.15 p.m. he was near the railway gate talking with Satish Salve and Manoj where Dattatraya came with his daughter and Ganesh. At that time, all the accused came in a jeep. They got down, went near Dattatraya and then accused Bhagwan Shinde caught Nana and Mahesh, the accused no. 5 stabbed Nana in the stomach with a dagger. He along with Suresh and Manoj rushed

towards Nana, lifted Nana, put him in a rickshaw and then Suresh took him to the hospital. In the meanwhile, Ganesh Kale chased the accused to catch them but, the accused Ramesh assaulted Ganesh with a dagger which gave a cut to his shirt. His shirt was stained with blood because, he lifted Nana.

15. Next witness is Suresh Salve PW 15. He has stated that he was knowing the deceased Dattatraya, Kumar Gavane, Ganesh Kale, Anuradha the daughter of Dattatraya and all the accused persons. On the place, date and time of the incident, he was standing near the railway gate. Dattatraya was standing with his daughter Anuradha. Ganesh Kale PW 16 was there. At that time, all the accused came in a jeep, stopped it, got down and Mahesh took out a dagger and stabbed Nana in the middle of his stomach. He has also stated that Ramesh assaulted Ganesh Kale with a dagger which in turn tore his shirt.

16. Next witness of the prosecution is PW 16 Ganesh Kale. He has stated that on the date of the incident, he went to the central naka near the railway gate. Nana was there with his daughter Anuradha. So also Kumar Gavane was there. At that

time, the accused came in a jeep. They stopped the jeep and got down. Accused Mahesh and Ramesh were holding weapons and Mahesh after questioning Nana, gave a blow on the chest of the deceased of Nana alias Dattatraya. According to him, other accused had held Nana. Thereafter, he shouted and went to catch Ramesh. Ramesh tried to stab him but the blow resulted in tearing his shirt. Thereafter, Nana was removed to the hospital.

17. Next witness is PW 17 Kumar Gavane. He has also given similar story of standing near the pan stall and accused coming there and Mahesh stabbing Nana with a dagger. It was he who had lodged the FIR Exhibit 71.

18. The last witness is PW 18 the Investigating Officer.

19. Mr.Thorat, contended that even if one does not go to the cross-examination of all the aforesaid eye witnesses, it would be clear that even there were five accused persons and the witnesses saw that all of them were armed Everyone is consistent that it was the accused no. 5 only who gave one single blow in the stomach of Nana which

resulted in the death of Nana alias Dattatraya. He, therefore contended that in the absence of any active role of the accused in instigating, aiding, abating of the incident, the accused no. 5 committed the murder of Dattatraya and it would be highly risky and dangerous to convict all five persons of one single family for the offence of murder. He also contended that even as per the medical report only one injury blow was given on the stomach and the so called story of other accused giving blow, accused Ramesh giving blow to Ganesh Kale and the blow resulting in tearing the shirt of Ganesh Kale cannot be taken at its face value. If the blow was given then there was no reason why he did not cause any injury to Ganesh Kale.

20. Mr.Thorat contended that invoking section 147, 148 of IPC against the accused and their conviction under those sections were absolutely improper. He also submitted that there was an improvement in the story of the prosecution by witness no..... who tried to contend that other accused held the deceased Nana and then accused no. 5 inflicted a fatal blow because, he was not supported by the other witnesses. He also contended that if

Dattatraya was assaulted by the five persons at a place which was a public place, surrounded by so many persons where atleast more than 6 to 7 persons were present on the spot it was highly impossible that not one of the spectator or witnesses would catch any of the accused when in fact at least three of the accused were not armed with weapons.

21. The learned A.P.P. tried to contend that the trial Court has rightly convicted all the accused. They had assembled together with the common intention to kill Dattatraya. It is difficult to accept this argument because, if all the five accused had common intention to eliminate Dattatraya, then at least it was expected that all of them were armed with deadly weapons when they launched an attack on the deceased Dattatraya. A single blow attributed to accused no.5 only would not have been given the result. There would have been multiple injuries.

22. It is pertinent to note in the spot panchanama Exhibit 24 there is no mention that on the place of the spot where the actual assault took place, any blood stains were found by the police or by the panchas.

23. The clothes of accused nos. 2 and 3 Bhagwan and Umesh were seized on 1st January, 2001 by the police as per the panchanama Exhibit 40. There are no blood stains on those clothes.

24. There is recovery of a knife at the instance of accused no.5 Mahesh along with the clothes of accused no. 5 as per panchanama Exhibit 52/2. But, Mr.Thorat strenuously urged that this recovery at the instance of Mahesh after 4 months of the incident does not inspire confidence at all.

25. On the entire appreciation of the evidence, therefore, it is clear that the prosecution has succeeded in proving its case against the accused no. 5 only. So far as accused nos. 1 to 4 are concerned, the evidence is not consistent. It does not fit in the theory of forming an unlawful assembly. The behaviour of wife of Dattatraya also appears to be unnatural. She had tried to show that she was courageous women but, it is difficult to believe that when she was coming back the accused were searching for her husband with a view to take revenge upon him, she would have the courage to go to them, question their authority and

challenge them to do whatever they wanted to do. This improbability creates doubt about her testimony that the accused before launching an attack had gone to the house of Dattatraya in order to search him. This weakens the case of the prosecution of common object of unlawful assembly being formed by the accused before launching the assault. The presence of only one single blow and fleeing of the accused from the spot also creates a doubt about the theory of unlawful assembly and common intention. If all the accused wanted to take revenge upon Dattatraya, they would have done something to cause him to death or to incite others. There is no such evidence in that regard.

26. For all these reasons, the appeal filed by accused nos. 1 to 4 is required to be allowed and their convictions are set aside and the appeal filed by accused no.5 is dismissed.

27. We, therefore pass the following order :

O R D E R

The appeal filed by accused no. 5 Mahesh

Bhagwan Shinde is dismissed. His conviction and sentence is maintained. Appeal Nos. 635 of 2002 filed by the original accused nos. 1 to 4 is allowed. Their conviction under sections 147, 148, 302 read with sections 149 IPC, 135 (1) of the Bombay Police Act is set aside and they are acquitted of the offence under sections 147, 148, 307 read with section 149 IPC, under section 302 read with section 149 IPC, 135 (1) of the Bombay Police Act.

The accused no. 1 be released forthwith if not required in any offence. Bail bond of other accused stands cancelled.

(Smt R.S.Dalvi,J) **(D.G.Deshpande, J)**